

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06/08/2003

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

C.A.No.212 of 2002 and C.A.No. 1271 of 2002

Union of India
Represented by the
Intelligence Officer
Narcotics Control Bureau
South Zone, C-3.A, Rajaji Bhavan
Besant Nagar, Chennai 600 090. .. Appellant in
CA 212/02 and
Respondent in
CA 1271/02

-Vs-

1. M.S. Faluluddeen @ Akeel
@ Mohamed Siddik .. 1st Respondent in
CA 212/02

2. A.C.M.Fazly
3. N.Akbar Ali .. Respondents 2 & 3
in CA 212/02 and
Appellants in
CA 1271/02

These two criminal appeals are preferred under Sec.374 of The Code of Criminal Procedure against the judgment of the Additional Special Judge for NDPS Act at Chennai made in C.C.No.107 of 2000 and dated 23.11.2001.

!For Appellant in
CA 212/02 and
Respondent in
CA 1271/02 : Mr.P.N.Prakash
Special Public Prosecutor
(NDPS)

^For Appellants in
CA 1271/02 and
Respondents 2 & 3
in CA 212/02 : Mr.AR.L.Sundaresan

For 1st Respondent

:COMMON JUDGMENT

This judgment shall govern both the appeals.

2. The appeal in C.A.No.212/02 is filed by the State against the acquittal of A-1 to A-3 of the in a narcotic case, while the appeal in C.A.No.1271/02 is filed by A-2 and A-3 challenging the conviction and sentence recorded against them along with A-1 in the case.

3. The necessary facts for the disposal of these two appeals are thus:

P.W.8 N.Mohan, an Intelligence Officer, attached to the Narcotic Control Bureau, Madras, submitted an information report under Ex.P25 on 21.3.2000 at 7.00 P.M. to his Superintendent P.W.11 Raghavan, a gazetted Officer. According to the said information about 4 kilograms of heroin is in Flat 1F, First Floor, Uma Complex, Kellys, Madras in the possession of A-1 Siddique, A-3 Fazly, Nazar- absconding accused and A-3 Akbar Ali. P.W.11 led a team of Officers to search the said flat. They proceeded to the place, where they had P.W.7 Murali and one Dhandayudhapani, not examined, as witnesses, since they agreed for the same. Since they agreed for the same, the Officials went to Flat F-1 and rang the calling bell. A-3 who opened the door partially, on seeing the officials shouted "Police! Police" and tried to close the door. Only after a brief struggle, the officials got entry and apprehended A-3. A-1 and the absconding accused who closed the doors of another room inside and jumped down through the balcony. While A-2 also tried to jump, he was apprehended by the officials. The said Nazar escaped, while A-1 Siddique who sustained injuries in his leg, was unable to run. He was also caught by the officials. After following the procedural formalities as contemplated under the provisions of the NDPS Act, P.W.1 Bhaskaran and P.W.11 recovered two packets of heroin namely M.O.2-2 kilograms and M.O.3-2.04 kilograms, totalling 4.04 kilograms under Ex.P1 mahazar. Samples were also taken therefrom marked as M.Os.5 to 8 from the contraband for the purpose of analysis. All the apprehended accused were taken to NCB Office and were enquired as to their role in the conspiracy. The statement of A-1 was recorded by P.W.4 Vijayalakshmi and marked as Ex.P16. The statement of A-2 was recorded by P.W.5 Shanmugam and marked as Ex.P19. The statement of A-3 was recorded by P.W.8 Mohan and marked as Ex.P26. In their statements, all the three accused thoroughly detailed their role in the conspiracy to traffic in heroin. As per the arrest memos under Exs. P17, P21 and P27 all the three accused were arrested, and they were produced before the remanding Magistrate along with Ex.P4 memo. All the samples were subjected to chemical examination by P.W.2 Natarajan, Chemical Examiner, and a report under Ex.P11 was placed wherein the Examiner has opined that the sample answers positive for Di-Acetylyl Morphine. After the completion of the investigation, the complaint was filed before the Special Court under the provisions.

4. In order to prove the charges under Sec.8(c) r/w 29 of NDPS Act against A-1, under Ss 8(c) r/w 21 and 8(c) r/w 21, 23, 25 and 29 of NDPS Act against A-1 and A-2 and under Sec.8(c) r/w 21 of NDPS Act against A-3, the prosecution examined 11 witnesses and marked 41 exhibits and 8 material objects. On completion of the evidence of the prosecution, all the accused

were questioned under Sec.313 of Cr.P.C. as to the incriminating circumstances found in the evidence of the prosecution, and all the accused flatly denied the whole case of the prosecution as false. No defence witness was examined. The trial Court on consideration of the available materials and submissions made by both sides found all the three accused guilty under Sec.8(c) r/w 21 of the N.D.P.S. Act and sentenced each of them to undergo R.I. for 10 years and to pay a fine of Rs.1,00,000/- in default to undergo 2 years R. I., while acquitted all the accused in respect of the other charges. Aggrieved over the conviction and sentence, A-2 and A-3 have preferred one appeal, while the State aggrieved over the acquittal of the accused in respect of all other charges has brought forth the other appeal.

5. Arguing for the appellants/A-2 and A-3 in CA 1271/02 and respondents 2 and 3 in CA 212/02, the learned Counsel raised the following submissions for consideration of this Court:

The prosecution in the instant case has thoroughly failed to prove the possession, much less conscious possession in respect of any one of the accused connecting them to the crime in question. It is admitted that the contraband was not recovered from the body of any of the accused. The prosecution proceeded with the case from the commencement only against A-1, but at the time of evidence adduced through P.W.9, the owner of the flat, it came to light that that A-2 was a tenant from whom he got advance and rental also, and thus, the prosecution was unable to prove who was the actual tenant and who was in possession of the premises, wherefrom the alleged contraband was seized. P. W.9 has nowhere spoken about or referred to A-1. Though the prosecution came forward with a case that 4 kilograms of heroin, the contraband in question, was recovered from the Flat 1F, First Floor, Uma Complex, Kellys, Chennai 10. The prosecution was unable to prove that either they had the conscious possession or had the mensrea or the necessary requisite knowledge by any positive evidence.

6. The learned Counsel for the appellants/A-2 and A-3 took the Court through the documentary evidence adduced along with the oral evidence through the witnesses. He would contend that in Ex.P25 it has been stated that A-1 was residing, and P.W.1 in his evidence has also stated that it was A-1, who informed that he was in custody of 4 kilograms of heroin. No evidence is available to connect A-2 and A-3 to the crime in question. The prosecution has relied on the evidence of P.W.7 as an independent witness. According to P.W.7, he was the Secretary of the residential flats in the said complex. It is highly doubtful whether he was a Secretary at all, since no documents in that regard were produced. According to P.W.7, he came to the building only by 9.30 P.M. when there was a crowd. But, P.W.1 Officer has stated that he was very well available at that time, when they went to the spot. Even in the mahazar, A-1 is shown as a tenant, and all the documents seized would also be reveal that A-1 was there.

7. The learned Counsel for the appellants/A-2 and A-3 and the learned Counsel for the first respondent/A-1 would submit that both the mandatory provisions of Ss 50 and 42(2) of the N.D.P.S. Act have not been complied with by the Officials, but violated; that in the instant case, according to the prosecution, Rs.2,00,000/- was recovered from the person of A-2, and under such circumstances, there arose a necessity to comply with the provisions of Sec.50 of the Act i.e. informing the accused as to his right to be searched

before a Magistrate or a Gazetted Officer, if he so desires; that in the instant case, the evidence was available to indicate that the same was very well informed to the accused, but they did not desire so, and the same was also reduced to writing by way of a memo; that it is pertinent to note that the same was not produced before the trial Court, which cast a doubt whether such procedural formality was adopted; that there was violation of Sec.42(2) of the Act; that from the available evidence, it would be very clear that the search was made between 9.30 P.M. and 2.30 A. M., and thus, it was after sent set and before sun rise; that had it been so, as per Sec.42 of the Act, necessary search warrant should have been obtained from the Magistrate, and if the officials felt that it would delay the process and would frustrate, the officials can record the reasons therefor and send the same to the superior within the stipulated time; that in the instant case the official has neither obtained the search warrant nor reduced the reasons for so doing nor sent it to the higher officials as required, and thus, in view of the violations of these two provisions under Ss 50 and 42(2) of the NDPS Act, the alleged search itself is vitiated; that in view of the above, the entire case of the prosecution would fall to ground; that without proper appreciation of both factual and legal position, the trial Court has found them guilty and sentenced to undergo imprisonment, and hence, the judgment of the lower Court has got to be set aside in respect of A-2 and A-3, and the appeal filed by them be allowed, and the appeal by State has got to be dismissed.

8. Countering to the above contentions put forth by the learned Counsel for the appellants/A-2 and A-3 and the learned Counsel for the first respondent/A-1, the learned Special Public Prosecutor made the following submissions:

P.W.8 gave Ex.P25 to his Superintendent P.W.11, who was a gazetted Officer and who constituted a team. From the evidence, it would be clear that all of them proceeded and a search was conducted, and hence, there is no question of violation of Sec.42 of the Act would arise in this case, in view of the fact that P.W.11 a gazetted Officer is empowered to proceed with, even without a search warrant to make a search during all hours of the day. So far as the contention of A-2 and A-3 that Sec.50 of the Act was not complied with is concerned, the facts and circumstances do not warrant the provisions of Sec.50 of the Act to be followed; that in the instant case, the flat where all the three accused were in possession was searched. It is true that Rs.2,00,000/- was seized from A-2, which was produced before the concerned Court the very day along with a mahazar. It is pertinent to point out that the said Rs.2,00,000/- what was seized from A-2 was neither the contraband nor the subject matter of the case, and hence, for making a search of a flat which was in the possession of A-1 to A-3, the provision of Sec.50 of the Act has no application at all. So far as the conscious possession of the accused was concerned, all the three accused were in possession of the property. At the time when the officials made the visit along with two witnesses, they rang the calling bell, and A-1 who opened the door, on seeing the officials shouted "police! police", and he was about to shut the door, but with some difficulty, the officials got entry into the room; that at that time, three of the accused out of four made their attempts to escape. In that attempt, the absconding accused namely Nazar escaped through the balcony, while A-1 jumped through balcony and sustained injuries. All the accused were arrested, and seizure has been conducted procedurally. 4 kilograms of heroin was produced by A-1

stating that they were in possession of the same, and in that regard, out of the two independent witnesses, P.W.7 was examined, and he has given a categorical narration of the entire incident, and under such circumstances, it would be futile on the part of the accused to state that they were neither in possession nor conscious possession of the contraband. It is a fit case where presumption has got to be drawn under Sec.35 of the Act. The prosecution by the evidence adduced proved the culpable mental state of the accused, and it is for the accused to prove otherwise, which they failed, and hence, the lower Court was perfectly correct in finding them guilty under Sec.8(c) read with 21 of the NDPS Act.

9. The learned Special Public Prosecutor assailing the judgment of the Court below in respect of the acquittal of the respondents/A-1 to A-3 of the said charges including the charge of conspiracy would urge that all the three accused were found in possession of the contraband, and the same has been recovered from them; that they were all occupying a particular room; that Rs.2,00,000/- was recovered from A-2, and it is true that there is no direct evidence for conspiracy, which was hatched up by the accused; that there are sufficient circumstance, from which the conspiracy could be well inferred, and hence, the judgment of the lower Court acquitting the accused on the charge of conspiracy has got to be set aside, and they should be dealt with in accordance with law.

10. This Court paid its full attention on the elaborate submissions made by both the Counsel for the appellants/A-2 and A-3 and for the first respondent/A-1 and the learned Special Public Prosecutor and made a close scrutiny of all the available materials. But, the Court is unable to notice any merit in either of the appeals.

11. The case of the prosecution as could be seen above, was that on a report placed by P.W.8 Intelligence Officer, P.W.11 Superintendent of Police, N.C.B., constituted a team to go to the Flat 1F (First Floor), Uma Complex, Kellys, Chennai 10 to work out the information. In the instant case, P.W.8 on receipt of the information has reduced the same into writing, and the same was also placed before the lower Court. From the evidence of P.Ws.8 and 11, who are all attached to the Department, it would be abundantly clear that when the team proceeded to the said flat, they had the assistance of P.W.7, who was the Secretary of the Flat Occupiers' Association of that complex and one Dhandayudhapani, the son of the owner of the flats, as both agreed to be witnesses for the search; that they went to the flat finding the door closed inside; that they rang the calling bell; that A-3 opened the doors partly, found the officials and raised a voice "police! police"; that with difficulty, they got entry into the flat, and immediately, three of the accused out of four made their attempts to escape, while A-1 and the absconding accused in their attempt to escape jumped through the balcony, and A-1 sustained injuries; and that the other absconding accused could not be caught, but the officials were able to apprehend the three persons, who were the accused before the Court below and made the enquiries required. In the instant case, since the search was made in Flat 1F (First Floor) Uma Complex, Kellys, Chennai, it has to be necessarily pointed out that no necessity arose to follow the mandatory provision under Sec.50 of the Act. Even then, the evidence of the officials would indicate that they informed to the accused about their right to be searched before a Magistrate or before a Gazetted Officer, which they replied not necessary. This fact that the information was

passed on as to the right as contemplated under Sec.50 of the Act has been spoken to not only by the officials, but by P.W.7, an independent witness. The comment made by the learned Counsel for the appellants/A-2 and A-3 that it is highly doubtful whether P.W.7 was the Secretary of the Flat Occupiers' Association has got to be discountenanced for the simple reason that he has spoken to all the details about the flats. The Court is unable to see any circumstance or reason to disbelieve the evidence of P.W.7, who is a resident in one of the flats and who happened to be the Secretary of that Association. No animosity or enmity that he entertained against the accused has been brought forth. 12. Apart from the above, when it was enquired, A-2 came voluntarily and whispered that they were in possession of 4 kilograms of heroin, and pursuant to the search of the room, the contraband in two packets one containing 2 kilos and the other 2.04 kilos totalling 4.04 kilos was seized. The evidence was available for taking out the samples out of it, and the preparation of the mahazar, and hence, the evidence of P.Ws.1, 8 and 11 in this regard is fully corroborated by the evidence of P.W.7. Thus, the Court is able to find the positive evidence put forth by the prosecution as to the possession of the contraband in question by all the three accused at the time of search and seizure. Therefore, the contentions put forth by both the Counsel for the accused that the prosecution initially proceeded with a case that A-1 was a tenant, but the same was denied as if A-2 was a tenant, through the evidence of P.W.9, and hence, the same would show the falsity of the prosecution case cannot be accepted. The Court is of the view that the said evidence cannot in any way affect the case of the prosecution, since it is not a question on hand as to who was the tenant of the premises at that time or not a tenancy dispute. Quite evident it is from the available evidence that all the three accused at that particular point of time were occupying the said room, and hence, as rightly pointed out by the learned Special Public Prosecutor, it is a fit case, where the Court has to draw the presumption as to the culpable mental state of A-1 to A-3 under Sec.35 of the N.D.P.S. Act. It is true that it is a rebuttable presumption, but A-1 to A-3 have failed to rebut the same, and hence, without any hesitation whatsoever, it has got to be necessarily found that they were in illegal possession of the four kilograms of heroin at the time of search and seizure.

13. Insofar as the other contention that since the search and seizure have taken place during night hours between sunset and sunrise, necessary search warrant should have been obtained from the concerned Magistrate by the officials is neither sound nor legally founded in view of the facts of this case. Admittedly, P.W.11, the Superintendent of Police on receipt of the information has constituted a team and proceeded along with P.Ws.1 and 8 to the spot. Even from the mahazar relied on by the prosecution and marked as Ex.P1, it would be clear that the search was made by P.W.8 in the presence of P.W.11. He has also signed the mahazar. Hence, it is quite evident that a team was constituted by P.W.11 consisting of the other officials, and the search was conducted. In the decision of this Court rendered by Karpagavinayagam, J, in C.A.No.346/92 (THE ASSISTANT DIRECTOR, DRI. VS. NARAYANASWAMY RAVISHANKAR), following the decision of the Apex Court reported in 2000(1) S.C.C. 329 (MD. HUSSAIN PARAH V. UNION OF INDIA), it has been held thus:

"31. In this case, P.W.1 is admittedly a Deputy Collector in Customs and Gazetted Officer. Therefore, P.W.1 would not come under the category as

mentioned in Section 42, but he would include in the category of the Gazetted Officers as provided under Section 41(2).

32. In the similar case, it was held by the Supreme Court in 2000(1) S.C.C. 329 (MD. HUSSAIN PARAH V. UNION OF INDIA) that when a search was carried out by the officers referred to under Section 41(2), they were not required to comply with the provisions of Section 42.

.....

38. There is a major difference in the wordings in Sections 41(2) and 42 of the Act. It is said in Section 41(2) that any such officer of Gazetted rank of the specified department, if he has reason to believe from personal knowledge or from information regarding the offence under this Act, may himself arrest the person and search of the building, conveyance or place both in the day time and in the night time or authorise any officer subordinate to him who is superior to a Constable."

From the judgment of the Apex Court, which was followed by this Court in the judgment referred to above, it would be quite clear that when a search is made by an Officer of Gazetted rank like P.W.11, no search warrant is necessary as contemplated under Sec.41(2) of the NDPS Act, and it is not a case where a warrant was necessary under Sec.42(2) of the Act, and hence, the Court is unable to appreciate all or any one of the contentions put forth by the appellants/A-2 and A-3. Therefore, the lower Court was perfectly correct in finding them guilty under Sec.8(c) read with 21 of the NDPS Act as to the illegal possession.

14. Coming to the question of punishment, the lower Court has awarded the minimum punishment of 10 years R.I. along with a fine of Rs.1,00,000/- and in default 2 years R.I. The Court is of the considered view that while confirming the substantive sentence, the default sentence of 2 years R.I. has got to be reduced to 3 months R.I. Except the modification in the default sentence, there is nothing to interfere in the conviction and the rest of the sentence imposed by the Court below on A-2 and A-3.

15. So far as the appeal filed by the State is concerned, the Court is unable to agree with the contentions put forth by the prosecution that the conspiracy could be inferred from the proved facts. The Court does not find any proved facts from which inference could be drawn that the accused were in possession of 4 kilograms of heroin; and that Rs.2,00,000/- recovered from A-2 was pursuant to a conspiracy hatched up between them. There is nothing to interfere in the judgment of acquittal passed by the lower Court. Hence, the Court is of the considered view that the appeal by the State has no legs to stand, and the same has got to be dismissed.

16. In the result, the default sentence of 2 years R.I. imposed by the lower court on A-2 and A-3 is modified, and in default of payment of fine of Rs.1,00,000/-, the appellants/A-2 and A-3 shall undergo 3 (three) months R.I. In other respects, the judgment of the lower Court is confirmed. With the above modification, both the criminal appeals are dismissed.

Index: Yes

Internet: yes 6-8-2003

To:

- 1) The Additional Special Judge for NDPS Act, Chennai.
- 2) The Special Judge for NDPS Act, Chennai.
- 3) The Principal Judge, Chennai.

- 4) The Superintendent, Central Prison, Vellore and Cuddalore
- 5) The Special Public Prosecutor (NDPS), Chennai.
- 6) The D.I.G. of Police, Chennai 4.
- 7) The Intelligence Officer, Narcotics Control Bureau,
South Zone unit, Chennai 90.

nsv/

M.CHOCKALINGAM, J.

nsv/

C.A.Nos.212 and
1271/2002

Dt: 6-8-2003

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